No. 03-5

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

DETROIT, DETROIT, L.L.C.,

Petitioner,

v.

LAC VIEUX DESERT BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS,
a federally recognized Indian Tribe, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents submit that the following question more accurately reflects the lack of merit and significance of Petitioner's Petition for Writ of Certiorari:

> Did the Court of Appeals correctly deny Petitioner's motion to intervene as untimely, given that Petitioner moved for intervention in the first instance with the Court of Appeals, after six years of litigation, final judgment and three appeals, all during which it was aware of its purported interests in the litigation?

LIST OF PARTIES

Petitioner Below:

Detroit, Detroit, L.L.C.

Respondents Below:

Atwater Entertainment Associates, L.L.C.
Detroit Entertainment, L.L.C.
City of Detroit
Detroit City Council
MGM Grand Detroit, L.L.C.
Greektown Casino, L.L.C.
Lac Vieux Desert Band of Lake Superior Chippewa Indians

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Atwater Entertainment Associates, L.L.C. is a member of Detroit Entertainment, L.L.C. Circus Circus Michigan, Inc., a wholly owned subsidiary of Mandalay Resort Group (a publicly owned corporation), is also a member of Detroit Entertainment, L.L.C.

There is no publicly held corporation owning stock in Greektown Casino, L.L.C.

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Respondents, Atwater Entertainment Associates, L.L.C. ("Atwater"), Detroit Entertainment, L.L.C. ("Detroit Entertainment") and Greektown Casino, L.L.C., ("Greektown"), respectfully request that this Court deny Petitioner Detroit, Detroit, L.L.C.'s *Petition for a Writ of Certiorari* (June 30, 2003) ("Petition"), seeking review of the Order of the United States Court of Appeals for the Sixth Circuit dated March 28, 2003 (Appendix A to Petition) ("Order").

STATEMENT OF THE CASE

In November of 1996, the electorate of the State of Michigan voted to approve an initiative authorizing casino gaming in the City of Detroit. The Michigan Legislature later codified that initiative as the Michigan Gaming Control and Revenue Act, Mich. Comp. Laws § 432.201, *et seq.* ("Gaming Act"). To implement the Gaming Act at the city level, the Detroit City Council adopted the Casino Development Competitive Selection Process Ordinance on June 18, 1997 ("Ordinance"). The Ordinance included a potential preference which the Mayor of Detroit was permitted to apply as a tie-breaker in the selection process. Only Atwater and Greektown were eligible for the preference.

On February 25, 1997, Lac Vieux Desert Band of Lake Superior Chippewa Indians ("LVD") filed this action against the Michigan Gaming Control Board ("MGCB") and its members, the City of Detroit, its Mayor and City Council members, seeking to declare the Gaming Act unconstitutional in six separate counts. Atwater and Greektown intervened on May 19, 1997. LVD later

amended its complaint to include a challenge to the Ordinance.

On June 23, 1997, the City issued its Request for Proposals/Qualifications ("RFP/Q") Phase I. As part of the RFP/Q Phase I, each of the 11 competing developers, including Petitioner, were required to sign a comprehensive release of all claims relating to the selection process. On August 1, 1997, the 11 applicants submitted a response to the RFP/Q Phase I. Petitioner was eliminated in that first round.

Following submission of the RFP/Q Phase II and a second round of eliminations, the Mayor announced the winners of the selection process: Detroit Entertainment[1], Greektown and MGM Grand Detroit, L.L.C. The Mayor did not apply the preference to select Detroit Entertainment, although he did apply the preference to select Greektown over the fourth semi-finalist, Mirage Resorts, Inc. The selected developers subsequently entered into development agreements with the City and became licensed by the MGCB to conduct casino gaming within the City of Detroit. All three are currently operating casinos in Detroit and have been for several years..

As the City moved forward with its casino project, LVD's case against the City and other defendants progressed as well. On April 12, 1999, the Sixth Circuit Court

[1] Detroit Entertainment, formed on July 15, 1997, consists of Circus Circus Michigan, Inc. and Atwater Casino Group, L.L.C. Atwater Casino Group, L.L.C. is comprised of Atwater and ZRX, L.L.C. Although Atwater was eligible to receive a preference under the Ordinance, Detroit Entertainment was not and did not.

of Appeals held that LVD had standing to challenge the Ordinance but lacked standing with regard to the Gaming Act. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 172 F.3d 397 (6th Cir. 1999) ("*Lac Vieux I*"). The Sixth Circuit also concluded that the preference provisions of the Ordinance implicated the First Amendment and were content-based restrictions subject to strict scrutiny review. *Id.* at 409.

On remand, the district court determined that the Ordinance survived strict scrutiny. The Sixth Circuit reversed that decision on January 11, 2002. *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Bd.*, 276 F.3d 876 (6th Cir. 2002), *cert. denied*, 536 U.S. 923 (2002) ("*Lac Vieux II*"). Following *Lac Vieux II*, the district court issued an order declaring the Ordinance unconstitutional in its current form. LVD then filed a motion for further relief in which it argued that because the Ordinance was unconstitutional, the district court was required to enjoin the current developers from operating their casinos and compel the City to conduct a new competitive bidding process. The district court denied LVD's motion on July 9, 2002, and LVD appealed the decision of the district court to the Sixth Circuit for a third time. That appeal is currently pending.

Despite signing a release and delaying 51/2 years, Petitioner filed a motion to intervene with the district court on July 15, 2002. On its own motion, the Petitioner withdrew its intervention motion 14 days later. On February 6, 2003, Petitioner filed a motion to intervene with the Sixth Circuit. In that motion, Petitioner conceded that it was barred by the release from initiating this action, but contended that nonetheless it was somehow now entitled to partake in any remedy that may be ordered. After

extensive briefing, the Sixth Circuit denied Petitioner's motion to intervene as untimely. Petitioner now asks this Court to review the Sixth Circuit's decision.

REASONS FOR DENYING THE PETITION

The Court should deny the Petitioner's request for review of the Sixth Circuit's decision denying intervention for three reasons. First, the Petitioner has misstated both the Sixth Circuit's decision and the law on intervention in a transparent attempt to transform its insignificant Petition into something worthy of review by this Court. Second, contrary to Petitioner's bald assertion, the Sixth Circuit's Order does not conflict with decisions of this Court or other circuit courts. Indeed, the Order is perfectly consistent with all relevant precedent. Finally, review is improper because the Sixth Circuit fully considered and correctly denied Petitioner's intervention motion.

I. In its attempt to create significance where none exists, Petitioner both misstates the applicable standard of review and mischaracterizes the Sixth Circuit Court of Appeals' holding.

Petitioner misstates the law in its Petition by asserting that the standard of review is *de novo* when, in fact, it is well-established that denials of intervention for timeliness are reviewed for an abuse of discretion. *NAACP v. New York,* 413 U.S. 345, 366 (1973). Petitioner cites *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), in support of its claim that the standard of review is *de novo*. *Bose,* however, merely holds that an appellate

court reviewing a district court's findings in a First Amendment case must independently review the record to determine whether there has been a violation of the First Amendment. *Id.* at 514. Petitioner does not seek review of the Sixth Circuit's findings that its First Amendment rights were violated, for the Sixth Circuit made no such findings. Rather, Petitioner seeks review of the Sixth Circuit's denial of its motion to intervene. Although Petitioner cryptically suggests that the denial of intervention by the Sixth Circuit somehow implicates its First Amendment rights and therefore requires review under a lower standard, Petitioner provides no real analysis or support for such a proposition.[2] Even though the underlying case involves the First Amendment, Petitioner's motion for intervention is obviously not governed by First Amendment principles and standards. The only relevant standards are those pertinent to a motion to intervene, which are the exact standards applied by the Sixth Circuit in its Order.

In addition to misstating the standard of review, Petitioner also seriously mischaracterizes the Sixth Circuit's Order. Petitioner first asserts that the Sixth Circuit "virtually ignored all the case law," when in the same breath, it admits that the Sixth Circuit correctly cited the five factors to consider in regard to timeliness. Petition at 8, 8 n.3. Additionally, Petitioner claims that the Sixth Circuit's Order was "[c]ontrary to case law" simply

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[2] Despite its assertion that the standard of review is *de novo*, Petitioner implicitly acknowledges the weakness of its argument by analyzing the Sixth Circuit's decision pursuant to the higher standard, abuse of discretion.

because the Sixth Circuit's Order was short and to the point – as if the case law mandates that decisions on timeliness be a certain length, which it obviously does not. *See* Petition at 8-9. Finally, based solely on the length of the Sixth Circuit's Order, the Petitioner states that "[t]he only conclusion that can be drawn from the Sixth Circuit's decision is that the length of time that has passed was the sole basis of its decision and as such is an abuse of discretion." Petition at 9. Quite the contrary, the Order's brevity reflects Petitioner's patent failure to meet the timeliness standard. *See* Part III, *infra*. Petitioner further mischaracterizes the Sixth Circuit's decision as vague and contrary to law, when its only defining characteristic is succinctness. (Indeed, Petitioner argues that because the Order is supposedly "vague", the Order itself must be unconstitutional).

II. Contrary to Petitioner's assertion, the decision below does not conflict with the decisions of this Court or other circuit courts.

In a desperate attempt to create the appearance of importance, Petitioner erroneously claims that the Sixth Circuit's decision conflicts with decisions of this Court. In support of this assertion, Petitioner cites only one Supreme Court decision, *NAACP*, 413 U.S. 345, in which this Court held that timeliness is to be determined from all the circumstances. *Id.* at 366. While Petitioner correctly cites *NAACP*, Petitioner fails to demonstrate that the Sixth Circuit did not take into consideration all the relevant circumstances when issuing its decision on the timeliness of Petitioner's intervention motion. As Petitioner admits, the Sixth Circuit's Order correctly describes the factors which affect timeliness, Petition at 8 n.3, and the Court's

decision is not contrary to any of those factors.[3] In truth, *NAACP* supports rather than contradicts the Sixth Circuit's decision by holding that "if [a motion to intervene] is untimely, *intervention must be denied.*" 413 U.S. at 365 (emphasis added).

Petitioner also claims that the Sixth Circuit's Order conflicts with other circuit court decisions. This contention is simply wrong. The factors considered by the Sixth Circuit for determining timeliness, which were correctly set forth in the Order, are entirely consistent with the factors listed in cases from other circuits, including those cases cited by Petitioner. Compare *Jordan v. Michigan Conf. of Teamsters Welfare Fund,* 207 F.3d 854, 862 (6th Cir. 2000) to *e.g., Sierra Club v. Espy*, 18 F.3d 1202, 1204-05 (5th Cir. 1994); *United States v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984); *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001). Furthermore, nearly all Circuit courts have shown reluctance to allow intervention when the applicant was aware of the litigation but delayed in seeking to intervene, as in this case. *See, e.g., American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co.*, 112 F.2d 669, 670 (2nd Cir. 1940); *In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 501 (3rd Cir. 1982); *Jones v.*

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[3] Moreover, assuming arguendo that the Sixth Circuit's decision did not take into account all of the relevant circumstances as required by *NAACP*, the Court's error would merely "consist[ ] of the misapplication of a properly stated rule of law." S. Ct. R. 10. While conceding that the Sixth Circuit's Order states the proper law on timeliness for intervention, Petitioner's basic complaint is that the court failed to apply the factors to its case. Petitioner at 8 n.3, 8-9. Even if this were the case, which Respondents dispute, such misapplication of the law does not merit review by this Court.

Caddo Parish School Bd., 704 F.2d 206, 219 (5th Cir. 1983); *Michigan Ass'n for Retarded Citizens v. Smith*, 657 F.2d 102, 105 (6th Cir. 1981); *FDIC v. Hanrahan*, 612 F.2d 1051, 1053 (7th Cir. 1980); *EEOC v. Westinghouse Elec. Corp.*, 675 F.2d 164, 165-66 (8th Cir. 1982); *Petrol Stops Northwest v. Continental Oil Co.*, 647 F.2d 1005, 1010 (9th Cir. 1981); *United States v. Jefferson County*, 720 F.2d 1511, 1516-17 (11th Cir. 1983); *Moten v. Bricklayers, Masons & Plasterers Int'l Union of America*, 543 F.2d 224, 228 (D.C. Cir. 1976).[4]

III. The Sixth Circuit fully considered Petitioner's motion to intervene and correctly denied that motion.

In addition to the insignificance of the issues raised in the Petition, this Court should deny Petitioner's request for review because the Sixth Circuit fully considered and properly denied the Petitioner's intervention motion.

The threshold requirement for intervention under Rule 24(a)(2) of the Federal Rules of Civil Procedure is timeliness of the application to intervene.[5] Considering the

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[4] Even if the Sixth Circuit did not consider all the relevant circumstances, which Respondents do not concede, there is still no conflict between the Circuits which this Court need resolve. The Sixth Circuit's view of timeliness under Rule 24(a)(2) is squarely in line with other Circuits. *Id.*

[5] Although the Federal Rules of Civil Procedure apply only in district court, the Sixth Circuit properly looked to FED. R. CIV. P. 24(a)(2) for guidance, since there is no appellate rule or Sixth Circuit rule governing intervention on appeal. *See International Union, United Auto., Aerospace and Agric. Implement Workers of America AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965). Although the Sixth

(Continued on following page)

Sixth Circuit's five factors for timeliness, Petitioner's intervention motion was unquestionably belated.[6]

First, by the time Petitioner moved to intervene in the case, final judgment had been entered. The Ordinance had been declared unconstitutional and LVD had been awarded fees. After extensive briefing and a lengthy show cause hearing, the district court denied LVD any further relief. Petitioner waited until this hearing was over, final judgment was entered and the case was on its third appeal to the Sixth Circuit before moving to intervene. As recognized by the Sixth Circuit, this factor weighed heavily against allowing intervention. *See* Order ("This litigation has been pending for more than six years, with two prior appeals to this Court. The district court has now entered a final judgment, which is the subject of this third appeal.") *See also United States v. Tennessee*, 260 F.3d 587, 592 (6th Cir. 2001).

Circuit has not addressed the standard for intervention on appeal, several circuit courts have adopted a higher standard than that applied by the district courts. *See, e.g., Hutchinson v. Pfeil*, 211 F.3d 515, 519 (10th Cir. 2000) ("A court of appeals may, but only in an exceptional case for imperative reasons, permit intervention where none was sought in the district court").

[6] The five factors include:

> (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenors' failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention.

Stupak-Thrall v. Glickman, 226 F.3d 467, 473 (6th Cir. 2000).

Second, Petitioner's purpose for intervention is clearly improper. Petitioner seeks to intervene to partake in any settlement or remedy which may occur at this late stage of the proceedings. In other words, Petitioner is seeking to intervene to reap whatever benefit LVD may achieve after six expensive and contentious years of litigation. Yet, by signing the release prior to submitting a bid and competing in the selection process, Petitioner unquestionably forfeited any rights to a remedy in this case. *See Barden Detroit Casino, L.L.C. v. City of Detroit*, 59 F. Supp.2d 641 (E.D. Mich. 1999), *aff'd,* 230 F.3d 848 (6th Cir. 2000). Because Petitioner has no right to any benefits resulting from this litigation, its purpose for intervening is illegitimate.

Third, Petitioner knew about this case from its inception – which was six years prior to its intervention motion – yet never requested to intervene in the district court, and only moved to intervene in the Sixth Circuit in February 2003. Petitioner argued that it was not dilatory in filing its intervention motion because it only gained standing once the Sixth Circuit ruled the Ordinance unconstitutional. Even if this erroneous and unsupported theory were accepted, under Petitioner's own logic it should have moved to intervene in January 2002, when *Lac Vieux II* was issued, rather than February 2003. This fact was recognized by the Sixth Circuit in its Order. ("Detroit L.L.C. argues that by at least January of 2002, when this Court concluded that the City Ordinance was unconstitutional in *Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Michigan Gaming Control Board*, 276 F.3d 876 (6th Cir.), *cert. denied*, 122 S.Ct. 258 (2000), it had standing and was aware of its interests in this litigation.").

Fourth, Petitioner's intervention would cause severe harm to the other parties. It would invite every disappointed or "potential" bidder for a Detroit casino to intervene in the pending appeal. The result would be a barrage of briefs and new issues to further complicate and delay this matter.

Finally, Petitioner failed to identify any unusual circumstances that would suggest it should be entitled to intervene at this late stage of the proceedings.

In finding that Petitioner's intervention was untimely, the Sixth Circuit did not need to reach the other factors for intervention. *See NAACP*, 413 U.S. at 365. It is worth noting, however, that Petitioner fails to satisfy those requirements as well.[7] Petitioner has no right to a remedy in this case since it was barred both by the release it signed and the standing doctrine from bringing an action in this case. It therefore has no substantial legal interest in the subject matter of this litigation. *See Barden Detroit Casino, supra*. Because Petitioner has no substantial legal interest, intervention is not required to protect whatever interest Petitioner claims, and such interest does not require representation.

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[7] In addition to timeliness, the elements for intervention include:

> (1) the applicant's substantial legal interest in the case; (2) the impairment of the applicant's ability to protect that interest in the absence of intervention; and (3) inadequate representation of that interest by parties already before the court.

Michigan State AFL-CIO v. Miller, 103 F.3d 1240, 1245 (6th Cir. 1997).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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